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COMMENT.

The United States Supreme Court, in its decision of March 22d, in the case of *U. S. v. Trans-Missouri Freight Ass'n*, declares that combinations of railways formed for the purpose of maintaining rates are illegal under the Sherman Anti-Trust Act of 1890, and in contravention of the Interstate Commerce Act of 1887. This decision, involving as it does such great questions both of economics and of law, ranks in the opinion of the press "scarcely second in its wide-reaching importance to any other decision of the Supreme Court." The case arose in 1892, when the United States District-Attorney of Kansas brought suit to dissolve the Trans-Missouri Freight Association as a conspiracy in restraint of trade under the Sherman Act. The defendant association was composed of eighteen competing railway companies which entered into a contract by which they agreed "not to compete, to charge non-competitive rates on all competing roads between the same termini, and to divide upon a certain ratio all freights shipped by these routes not especially designated by the shipper to one road in preference to the others." Although the association in its original form was dissolved during the progress of litigation, the agreement on rates was maintained by the roads and upheld by the Circuit Courts (53 Fed. Rep. 440; 19 U. S. App. 36). The Supreme Court reversing the judgments of the lower courts, decides, by the narrowest majority, that such agreements are an unlawful restraint of trade, and an attempt to monopolize interstate commerce.

The majority opinion of Mr. Justice Peckham regards as the two important questions demanding consideration, (1) whether the Sherman Act applies to common carriers by railroad, and (2) if so, whether the traffic agreement violated any provision of the Act. As to the first question the court says, "The language of the Act includes every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several States, or with foreign nations. Unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade, we see no escape from the conclusion that the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another

are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of articles transmitted, such agreement would at least relate to the business of commerce, and might more or less restrain it." The court also holds that the Interstate Commerce Act does not authorize an agreement of this nature. In discussing the second question as to the true construction of the statute, Mr. Justice Peckham denies the position of the defendant association that the common-law meaning of the phrase "contract in restraint of trade" includes only such contracts as are in unreasonable restraint of trade. He calls attention to the difficulty of judging as to what is a "reasonable rate" for transportation, and contends that to say that the Act does not cover agreements which are not in unreasonable restraint of trade and which tend simply to keep up reasonable rates, is substantially to leave the question of reasonableness to the companies themselves. In reply to defendant's argument that the prohibition of agreements as to rates results in rate-cutting and prejudices public interest, the court says, "It is a matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. * * * Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

Toward the close of the majority opinion Mr. Justice Peckham distinguishes the English case of the *Mogul Steamship Co. v. MacGregor* (1892) App. Cas. 25, emphasized by the defendant and the courts below, by the fact that that case was governed by the common law, while the case at bar involves the interpretation of a statute. Thus the court's decision is made on the ground that it must construe the law according to the language used and not read into a statute what it may take to be the intention of Congress.

The strong dissenting opinion of Mr. Justice White holds that the traffic agreement was only such as looked to the uniform classification of freight, by which secret under-cutting was avoided and rates secured against arbitrary and sudden changes. His main argument was that to define the words "in restraint of

trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include those contracts which are the very essence of trade and every contract or combination by which workingmen seek to peaceably better their condition.

In reversing the greater part of the decision of Judge Locke of the Southern District of Florida (78 Fed. 175), the Supreme Court, in the case of the steamer *Three Friends* (17 Sup. Ct. 495), has rendered a decision decidedly favorable to Spain, especially considering the treatment some Americans have recently undergone at the hands of Spanish subjects. The steamer was seized by the Collector of Customs of St. Johns, Florida, on the charge that she was a filibustering steamer which had violated the neutrality laws in assisting the Cuban insurrectionists against Spain. The main question turned upon the interpretation of Rev. St. §5283, forbidding the fitting out and arming of a vessel with intent that she be employed in the service of any Prince or State, "or of any colony, district or people"—as to whether these latter words included any insurgent body of people acting together in conducting hostilities, although their belligerency had not been recognized.

Chief-Justice Fuller, delivering the opinion of the court, stated that it was true that in *Wiborg v. U. S.*, 16 Sup. Ct. 1127, 1197, the court had referred to Sec. 5283 as dealing "with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace"; but that was matter of general description only. The bill is headed "Neutrality," which the Chief-Justice defines as "abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties; but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality, when the disturbance has acquired such a head as to have demanded the recognition of belligerency." As Attorney-General Hoar pointed out (13 Op. Attys. Gen. U. S. 178), the Act was not alone intended to secure neutral action, but also to punish offenses against the United States. The crucial words, "colony, district, or people," were said to have been inserted in the original Act drawn by Hamilton in 1793, on the suggestion by the Spanish Minister in 1817 that the word "state" might not include the South American Provinces in revolt, and not yet recognized as independent. The reasonable conclusion is, that

the inserted words were intended to include communities whose belligerency had not been recognized, and Chief-Justice Marshall in *The Gran Para*, 7 Wheat. 471, 489, seems to have been of this opinion. While the word "people" may mean the entire body of the inhabitants of a state, its meaning in this branch of the section, taken in connection with the words "colony" and "district" covers any insurgent body of people acting in concert, although its belligerency has not been recognized. It belongs to the political department to determine when belligerency shall be recognized, but the present case sharply illustrates the distinction between recognition of belligerency and recognition of political revolt; for here the political department has not recognized the existence of a *de facto* belligerent power, but has, by many proclamations and messages, judicially informed the court of the existence of an actual conflict of arms in resistance of a government with which the United States is on terms of peace and amity.

Justice Harlan, dissenting, considered that a very strained construction had been put upon the statute—one not justified by its words, or by any facts disclosed by the record, or by any facts of a public character (*i. e.*, documents issued by the Executive Branch of the Government) of which the court might take judicial notice. He concurred entirely with the opinion of Judge Locke of the District Court, whose main contentions were, that the words "or of any colony, district or people" were added simply as further description of both parties contemplated, and that the courts were bound by the actions of the political branch of the Government in the recognition of the political character and relations of foreign nations, and of the conditions of peace and war.

In the case of *Henderson Bridge Co. v. Commonwealth of Kentucky*, 17 Sup. Ct. Rep. 532, the United States Supreme Court rendered a decision on a question relative to interstate commerce which may prove far-reaching in its consequences. The main issue was as to the right of a State to tax the property of a company which by virtue of a State charter owned and operated a bridge over the Ohio River, connecting the States of Kentucky and Indiana. It appeared that the company derived its profits from outsiders who used the bridge in the transaction of interstate business and paid tolls for this privilege. The court took a technical view of this fact and decided that as it was not the company but its customers who were engaged in interstate com-

merce, a tax levied on the company by the State was legal and valid. Mr. Justice White in a dissenting opinion, speaking for three other justices, forcibly combats the position taken by the majority of the court and maintains that inasmuch as the interstate commerce was carried on over the bridge, the company owning the bridge and deriving its income from tolls paid by the carriers of such commerce was engaged in interstate commerce, and therefore that the tax on its property was unconstitutional and void. He holds, apparently with much reason, that the contention of the majority of the court is a mere distinction without a difference. The consequences of this decision, if the rule laid down is extended in its application to other means of interstate commerce, may well be disastrous. To quote from the dissenting opinion: "A large portion of the interstate commerce business of the country is carried on by freight lines. These lines arrange with the railways for transportation, pay them a charge or toll and upon this basis afford the public increased business facilities. Under the supposed distinction all this interstate commerce traffic ceases to be such, and the whole of the gross receipts become taxable in every State through which the business passes. The freight lines do not transport the merchandise; the railways do. Therefore, the receipts of the freight lines as to such lines are not interstate commerce receipts." The same reasoning would seem to apply to sleeping-car companies and express companies.